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TESTAMENTARY DELEGATION IN RELATION TO TRUSTS FOR PURPOSES AND CLASSES

by

JANET M. SUMMERS, B.A., LL.B.

Judicial strictures notwithstanding, testators continue to display a firm belief in the capacity of their executors and trustees to select not only the individual recipients of their bounty but, more generally, to dispose of the residue of their worldly wealth with only the vaguest of directions.[1]

Even where a testator indicates certain general or specific purposes, his trustees may be left to evolve a mode of execution, select the ultimate beneficiaries from a large and perhaps loosely-defined class or hold property on trust for objects and bodies outside the legally recognized categories of charity.

Trusts for non-charitable purposes

A. GENERAL

Apart from statutory provision,[2] trusts for purposes not purely "charitable" will fail, at least for uncertainty, where a settlor omits to express any method by which his intentions may be effected, for no court may execute the intended trusts by directing a scheme or permitting the trustees to do so.[3]

Thus in a recent decision in the N.S.W. Supreme Court,[4] ELSE-MITCHELL, J. held that a direction by will that money from a trust fund be paid to the proprietors of a newspaper "for appropriation by them in their absolute discretion for the advancement of deserving journalists, but in such a manner as" would perpetuate the name of the donor's father, was void for uncertainty.

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[1] For example, *Re Jones*, [1945] Ch. 105, in which the bulk of the testator's property was left "in trust for such person or persons living at the death of my said son" as he should appoint. *Re Hollole*, [1945] V.L.R. 295 in which the residue of an estate was left to the trustee "to be disposed of as he may deem best". *Chichester Diocesan Fund* v. *Simpson*, [1944] A.C. 341; [1944] 2 All E.R. 60, where the residue was directed to be held on trust "for such charitable institution or institutions or other charitable or benevolent objects as the trustee may select".

[2] Section 37D, *Conveyancing Act* 1919-1943 (N.S.W.); s. 131, *Law of Property Act* 1928 (Vict.), and s. 2, *Trustee (Amendment) Act* 1935 (N.Z.). See note [8] *post*.

[3] In the case of charitable trusts, where the terms are indefinite or there is a general gift to charity, the difficulty of uncertainty is overcome by directing the preparation of a scheme *cy-près* (*Moggridge* v. *Thackwell* (1803), 7 Ves. 36).

[4] *Perpetual Trustee Company (Limited)* v. *John Fairfax & Sons Pty. Ltd.* (1959), 76 W.N. (N.S.W.) 226.

Clearly, such a decision accorded with authorities, such as *Re Astor's Settlement*, where ROXBURGH, J. considered the objects of a settlement of income, intended *inter alia* to improve good understanding between nations, preserve the independence and integrity of newspapers and promote the freedom, independence and integrity of the Press, newspaper editors and writers, to be void for uncertainty. "If . . . an enumeration of purposes outside the realm of charities can take the place of an enumeration of beneficiaries, the purposes must . . . be stated in phrases which embody definite concepts, and the means by which the trustees are to try to attain them must also be prescribed with a sufficient degree of certainty. . . ."[5]

Justification for this ground of rejection he found in dicta requiring such certainty as will enable the court to administer the trust, should the trustees die, or control their administration, should they exercise their powers in bad faith.[6] Not only has this defect been held to invalidate schemes already formulated and in process of execution, but it has been applied also to avoid a completely executed trust, even where the trustees were empowered to select from both charitable and non-charitable objects, and had, in fact, selected charitable ones.[7]

The extent to which s. 37D, *Conveyancing Act* (1919-1943)[8] (N.S.W.) may save such trusts for indefinite purposes from total failure, was considered recently in the construction of Mr. F. G. Leahy's will, first by the N.S.W. Supreme Court and on appeal by the High Court[9] and Privy Council.[10]

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[5] *Re Astor's Settlement Trusts, Astor* v. *Scholfield*, [1952] Ch. 534; [1952] 1 All E.R. 1067.

[6] Lord Eldon, L.C., in *Morice* v. *Durham* (1805), 10 Ves. 522 at p. 539: "As it is a maxim that the execution of a trust shall be under the control of the court, it must be such, that it can be under that control; so that the administration of it can be reviewed by the court, or if the trustee dies the court itself can execute the trust."

[7] *Chichester Diocesan Fund* v. *Simpson*, [1944] A.C. 341; [1944] 2 All E.R. 60.

[8] Section 37D provides: (1) No trust shall be held to be invalid by reason that some non-charitable and invalid purpose, as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed.

(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.

[9] *A.-G. for N.S.W.* v. *Donnelly, Leahy* v. *Donnelly* (1958), 32 A.L.J.R. 44.

[10] *Leahy* v. *A.-G. (N.S.W.)* (1959), 33 A.L.J.R. 105.

The limitation of the section to cases in which a settlor has specified distinct and severable charitable and non-charitable purposes was rejected on appeal[11] in favour of the view that the section applied to all trusts in which the words used were wide enough to include not only "charitable" but also "non-charitable" purposes in one compendious expression. Hence, in a dispositive trust of residue "to use the income as well as capital . . . in the provision of amenities in such convents as my executors and trustees shall select either by way of building a new convent where they think necessary or the alteration of or addition to existing buildings . . .", the trustees' selection was limited to convents devoted exclusively to charitable purposes. But in both the High Court and the Privy Council, the provisions of the section were held insufficient to prevent the failure of trusts in which the settlor indicated no primarily altruistic purposes, and *a fortiori*, no particular purpose at all.[12]

B. SPECIFIC

The "tomb, monument and animal"[13] cases are the usually cited instances of trusts which have been upheld for specific but impersonal objects. Frequently described as honorary trusts or trusts of imperfect obligation, they have been criticised as powers whose exercise the residuary or resulting beneficiaries cannot control or direct. To dismiss them, however, as unenforceable testamentary directions[14] is, it is submitted, not altogether justified by authority.

Fresh support for the description of these cases as "concessions to human weakness and sentiment"[15] will, no doubt, be found by the cynics in the English courts' treatment of the will of Sir George Bernard Shaw. After various specific bequests, he directed his trustees to hold

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[11] *Re Belcher*, [1950] V.L.R. 11 was overruled. Fullagar, J. held in this case that a bequest to ". . . any other youth welfare organisation" could not be confined to charitable organisations (by virtue of s. 131, *Law of Property Act* 1928 (Vic.)), on the ground that the section "will only apply where the testator has expressly indicated a distinct and severable class of charitable objects".

[12] Cf. *Re Hollole*, [1945] V.L.R. 295, in which Byrne, J. held that s. 131 could not prevent an intestacy.

[13] *Pettingall* v. *Pettingall* (1842), 11 L.J. Ch. 176; *Re Dean* (1889), 41 Ch. D. 552; *Mitford* v. *Reynolds* (1848), 16 Sim. 105; *Pirbright* v. *Salwey*, [1896] W.N. 86; *Re Hooper*, [1932] 1 Ch. 38; *Re Chardon*, [1928] Ch. 464; *Re Thompson*, [1934] Ch. 342.

[14] Else-Mitchell, J. in *Perpetual Trustee Coy. (Limited)* v. *John Fairfax & Sons Pty. Ltd.* (1959), 76 W.N. (N.S.W.) 226.

[15] Underhill, *The Law of Trusts*, 8th ed., p. 79.

his residuary estate and the annual income thereof for a period of 21 years from his death on trust for the purpose (non-charitable) of propagating his revised spelling system.[15a]

HARMAN, J.,[16] although constrained by authority to hold that the trust funds vested immediately in the residuary beneficiaries, free of the trust, suggested that it would have been valid if it had been in the form of a bequest to the ultimate residuary legatees subject to a condition by which they could not complain of income during the first 21 years after the testator's death being devoted to the alphabet project. Support for this device he found in Morris & Leach's *Rule against Perpetuities*,[17] quoting the American Law Institute's Restatement of Trusts. The trust, however, did not fail for the Court of Appeal[18] sanctioned a compromise between the residuary legatees and the trustees whereby a sum of money would be devoted to the carrying out of the testator's intentions.[18a]

[15a] "(1) to ascertain by inquiry how much time could be saved by persons who speak and write the English language by the substitution for the present English alphabet of a proposed British alphabet containing at least 40 letters; to show the extent of the time and labour wasted by the use of the present alphabet, and, if possible, to show the loss of time in terms of loss of money;

(2) to transliterate one of the testator's plays into the proposed British alphabet; to advertise and publish the transliteration with the original lettering opposite the transliteration; page by page; and to present copies thereof to public libraries, so as to persuade the government or the public to adopt the proposed alphabet.

Subject to these trusts, or if and so far as the trusts should fail, *by judicial decision or otherwise*, the residuary trust fund and the income thereof" were given in equal shares to three named beneficiaries.

[16] *Re Shaw*, [1957] 1 All E.R. 745.

[17] 1956 ed. at p. 308: "Where the owner of property transfers it upon an intended trust for a specific non-charitable purpose and there is no definite or definitely ascertainable beneficiary designated, no trust is created; but the transferee has the power to apply the property to the designated purpose, unless he is authorized so to apply the property beyond the period of the rule against perpetuities or the purpose is capricious."

Cf. *Re Chamber's Settlement*, [1950] Ch. 267 and *Re Chardon*, [1928] Ch. 464, where a gift was upheld although subject to a trust for maintenance of a grave.

Nor is such a view contrary to *Public Trustee* v. *Nolan* (1943), 43 S.R. (N.S.W.) 169, where the testator's purpose may well be regarded as capricious.

[18] [1958] 1 All E.R. 245.

[18a] The Public Trustee, being satisfied that the sum was adequate to carry out the main purposes of the will and a practical scheme having been formulated, the Court required only an undertaking that the Trustee carry out the trusts within 21 years of Shaw's death and that any sum remaining go to the residuary legatees.

Such approval, it is urged, assumes the validity of impersonal trusts which comply with the requirements of the perpetuity rule and of certainty. And, as HARMAN, J. pointed out, since the residuary beneficiaries are "entitled to the estate except and in so far as it is not devoted to those purposes, the money being spent is the money of (such) legatees, or the ultimate remaindermen and they can come to the court and sue the executor for a *devastavit* or the trustee for a breach of trust, and thus, though not themselves interested in the purposes, enable the court indirectly to control them."[19]

Nor does such a view detract from the authority of such cases as *Re Astor's Settlement Trusts*,[20] *Chichester Diocesan Fund* v. *Simpson*[21] and *Perpetual Trustee Coy. (Limited)* v. *John Fairfax & Sons Pty. Ltd.*,[22] for Shaw had specified with no uncertainty the means by which his objects were to be achieved.

Trusts for classes

In recent years the English courts have been faced with an increasing number of settlements *inter vivos* of large estates, in which the complete enumeration of possible beneficiaries is not only difficult,[23] but impossible.[24] In many such settlements, the class of beneficiaries from which a trustee may select is defined only by such limits as "any past, present and future employees" of a specified company or business and frequently extends also to "the wives, widows and other dependents" of such employees.

The enforcement of such trusts as charities is precluded by the House of Lords' decision in *Oppenheim* v. *Tobacco Securities*,[25] where the Court refused "to regard common employment as a quality which constitutes those employed a section of the community".

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[19] [1957] 1 All E.R. 745 at p. 758. Cf. *Re Wightwick's Will Trusts*, [1950] Ch. 260; [1950] 1 All E.R. 698.

[20] [1952] Ch. 534; [1952] 1 All E.R. 1067.

[21] [1944] A.C. 341; [1944] 2 All E.R. 60.

[22] (1959), 76 W.N. (N.S.W.) 226.

[23] *Re Ogden*, [1933] Ch. 678. See p. 58 *post*.
Re Taylor, [1940] 2 All E.R. 637.
Re Eden, Ellis v. *Crampton*, [1957] 2 All E.R. 430.

[24] *Re Sayer Trust, MacGregor* v. *Sayer*, [1957] Ch. 428; [1956] 3 All E.R. 600, in which the class of appointees included all past, present and future employees, their infant children and other dependent relatives.

[25] [1951] A.C. 297; [1951] 1 All E.R. 31, following *Re Hoburn Aero Component Ltd.'s Air Raid Distress Fund*, [1946] Ch. 194; [1945] 2 All E.R. 711.

In construing the powers of selection commonly entrusted to trustees, the courts have had recourse to the decisions on powers of appointment inserted in wills and family settlements and the division of powers into "mere powers" and "powers in the nature of trusts" has been the basis for determining the validity of all types of settlements.[26]

Where the power of selection is construed as merely enabling the donee to choose the recipients of income from trust funds, it will be sustained, although the whole class of possible beneficiaries be unascertainable at any time prior to final distribution. It is sufficient if the settlor specifies the qualifications of the class, so that "it is possible to decide with sufficient certainty whether any particular *praepositus* is an object of the power or not",[27] for, unlike strict trusts, such powers do not create any beneficial interests in the class until the selection is made.

Where, however, a final distribution of settlement funds is to be made, it was held by the Court of Appeal in *Inland Revenue Commissioners* v. *Broadway Cottages Trust, Inland Revenue Commissioners* v. *Sunnylands Trust*[28] (followed in *Re Sayer Trust*) that the trustees had a duty to distribute the property.[29] In accordance with rules applied to trusts, the court refused to uphold the settlement, as the trustees were obliged to select beneficiaries from a class, of which not all the members were ascertained or ascertainable at any particular time. The Court of Appeal[30] based this decision on the ground that no particular person or persons had sufficient an interest in equity to compel the trustees to carry out the trust, and the terms of the trust were too uncertain for the court to execute itself.

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[26] Thus Harman, J. in *Re Gestetner, Barnett* v. *Blumka*, [1953] 1 Ch. 672 at p. 685, in construing a settlement *inter vivos*, which contained a trust to hold capital for members of a class comprising *inter alia* descendants of settlor's father and uncle, their spouses and relicts, relied on the principle accepted in family settlements, that the exercise of a discretionary power to appoint to children or grandchildren was valid, although not all possible appointees were born when any particular appointment was made.

[27] Per Upjohn J. in *Re Sayer Trust*, [1957] Ch. 428; [1956] 3 All E.R. 600.

[28] [1954] 3 All E.R. 120, in which there was a settlement for past, present and future employees of settlor.

[29] *Re Gestetner Settlement*, [1953] 1 Ch. 672, where Harman, J. held that as the trustees had no duty to distribute, but only to consider during the subsistence of the trust whether or no they were to distribute, it did not matter that they could not ascertain all possible persons or organizations qualifying for selection.

[30] Jenkins, L.J., made a detailed examination of previous decisions involving powers of appointment and trusts for distribution.

An examination of "powers in the nature of trusts" reveals a close similarity to those "special powers of appointment", described as an exception to the so-called rule against delegation of testamentary power, formulated in various dicta of the House of Lords and Privy Council in decisions relating to trusts for indefinite objects.[31] In statements condemning testamentary delegation, to trustees and others, of the selection of the beneficiaries of an estate, special powers were excepted where the class or group, within which the testator authorized appointments to be made, was defined with such certainty that it could be said that the testator had "disposed of the beneficial interest (himself) in favour of the class". Such powers must, therefore, if the dicta be regarded as constituting a general principle, fulfil the requirements of trusts, in that the beneficial interests must vest at the time the will comes into operation, so that all possible "beneficiaries" must be ascertainable at that time.[32]

Despite LORD SIMONDS' assertion that it is a cardinal rule that a man may not delegate his testamentary power and can only dispose of his estate in favour of ascertained or ascertainable persons, powers to appoint to classes consisting of unborn children or grandchildren[33] have been upheld, either as valid powers or as trusts for the class as a whole, for several centuries, whether created by will or settlement *inter vivos*. Powers to appoint among relations have also been enforced (in fact *cy-près*) by treating them, in default of appointment, as a trust for the next-of-kin or a contracted class, thus circumventing the requirement of certainty.[34]

It became so common to treat a power to appoint to relations as a trust, in default of appointment, for the class as a whole, that even where a testator named a class to take by way of gift over, the power might be construed

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[31] See dicta of Lord Haldane in *Houston* v. *Burns*, [1918] A.C. at pp. 342-3 and in *Attorney-General* v. *National Provincial & Union Bank of England*, [1924] A.C. 262 at p. 268, and of Lord Macmillan and Lord Simonds in *Chichester Diocesan Fund* v. *Simpson*, [1944] A.C. 341 at pp. 349 and 371, and Lord Macmillan in *A.-G.* v. *New Zealand Insurance Co. Ltd.*, [1937] N.Z.L.R. 33 at p. 35.

[32] For criticism of such powers as exceptions to the non-delegation principle, see D. M. Gordon "Delegation of the Will-Making Power", 69 L.Q.R. 334.

[33] See note [26] *supra*.

[34] *Harding* v. *Glyn* (1739), 1 Atk. 469; *Stead* v. *Mellor* (1877), 5 Ch. D. 225; *Salusbury* v. *Denton* (1857), 3 K. & J. 529; *Wilson* v. *Duguid* (1883), 24 Ch. D. 244; *Re Combe*, [1925] 1 Ch. 210.

as a trust for the appointees, so as to defeat those selected by the testator to take on default.[35] In *Re Weekes Settlement*,[36] it was held, however, that a power of appointment could not be construed as a trust for the appointees, merely because the testator had failed to specify a class to take in default.

Although no distinction has been made in English cases between the rules applicable to powers of appointment created by will and those created in settlements *inter vivos*, the High Court in *Tatham* v. *Huxtable*[37] extended the non-delegation dicta, to invalidate a power given to an executor/trustee to select the residuary beneficiaries of an estate. The will in question empowered the trustee to distribute any balance of the estate "to the [named] beneficiaries . . . or to others not otherwise provided for who, in my" [executor's] "opinion have rendered service meriting consideration by the testator".

It was contended that such a power was "general" and fell within the second exception to the non-delegation principle,[38] on the ground that it constituted the donee the beneficial owner of the property, so that the testator could be said to have disposed of the residue himself. LATHAM, C.J., in a dissenting judgment, considered the power was general and therefore valid, because it enabled the trustee to appoint to himself, he being a named legatee, so that the testator could be said to have disposed of the residue to a beneficiary whom he had selected.

KITTO and FULLAGAR, JJ., considered that the power was less than general, since the trustee did not have a completely unfettered power of distribution. Both treated it as one in the nature of a trust which could only be upheld if it complied with the standards required for appointees under special powers, referred to by LORD HALDANE; FULLAGAR, J. stating that "the power of the executor to

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[35] *Re Brierley* (1894), 43 W.R. 36; *Re Llewellyn's Settlement*, [1921] 2 Ch. 281; *Permanent Trustee Co.* v. *Redman* (1916), 17 S.R. (N.S.W.) 60; *Re Himmelhoch* (1928), 29 S.R. (N.S.W.) 90.

[36] [1897] 1 Ch. 289. Followed in *Re Mills*, [1930] 1 Ch. 650. *Re Combe*, [1925] Ch. 210; *Re Perowne*, [1951] 2 All E.R. 201.

[37] (1950), 81 C.L.R. 639.

[38] Lord Haldane in *Attorney-General* v. *National Provincial and Union Bank of England*, [1924] A.C. 262, excepted general powers of appointment from the non-delegation rule, as being "equivalent to property". Cf. *Re Hughes, Hughes* v. *Footner* (1921), 2 Ch. 208 at p. 212; *In Will of Lewis*, [1907] A.L.R. 431 at p. 433; *Grey* v. *Federal Commissioner of Taxation* (1929), 62 C.L.R. 49 at p. 63; *Muir* v. *Muir*, [1943] A.C. 468 at p. 483.

distribute the residuary estate is a power in the nature of a trust and the class of possible beneficiaries is not defined with sufficient certainty to give to its creation the character of a testamentary disposition".[39]

KITTO, J., unlike FULLAGAR, J., was prepared to except from the non-delegation rule certain powers, which he refused to class as general as specifying with sufficient certainty the class from which selection could be made on the assumption that "certainty may be achieved as well by an exclusive as by an inclusive description".[40] But such powers were upheld in *Re Jones*[41] and *Re Park*,[42] not on the ground that they fulfilled the requirements for trusts (although they involved the selection of residuary beneficiaries), but on the ground that the testator had given the trustees such a wide discretion that the power could be regarded as general.

If such powers are treated as less than "general" for the purposes of the non-delegation rule, the inescapable conclusion is that a power to appoint to any person for any purpose amounts to a valid disposition by the testator of his property, while a power to appoint to anyone except X is an invalid attempt to delegate its disposal to the donee of the power.

Despite the majority's decision in *Tatham* v. *Huxtable*, GRESSON, J., in *Re McEwen*,[43] in the New Zealand Supreme Court, held that a power given jointly to trustees to appoint themselves or any other persons as residuary beneficiaries of an estate, was general, on the grounds that the terms of the will did not impose a duty on the trustees to make an appointment and that the testator had himself effectively disposed of his estate by such provision.[44]

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[39] 81 C.L.R. at p. 651. Cf. the grounds of the decision of Jenkins, L.J., in the *Broadway Cottages Trust Case*, [1954] 3 All E.R. 120.

[40] 81 C.L.R. at p. 655.

[41] [1945] Ch. 105.

[42] [1932] 1 Ch. 580, where Clauson, J. upheld a bequest to A "on trust for such charities or persons other than himself as he (A.) should select".

[43] [1955] N.Z.L.R. 575.

[44] He preferred not to describe the power as "equivalent to property" as Roxburgh, J., in *Re Churston's Settled Estates*, [1954] 1 Ch. 334 at p. 344, considered (following dicta of Lord Selbourne in *A.-G.* v. *Charlton* (1879), 4 App. Cas. 427) a joint power of appointment to be very much further away from ownership than a general one vested in an individual.

Such a decision follows the trend of English decisions in which powers of appointment, although less than completely general and wider than special, are valid, even where they in fact enable a person other than the testator to complete the disposition of the testator's property. Nevertheless these "hybrid" powers are subject to the requirement of certainty in the qualifications[45] of the class of appointees or excludees, although no stricter standard has been laid down for wills than other settlements. In such cases as *Re Taylor, Midland Bank Executor & Trustee Co., Ltd.* v. *Smith*,[46] *Re Eden, Ellis* v. *Crampton*,[47] where the appointees, although residuary beneficiaries, consisted of such groups as "the past and present members of the staff of the Midland Bank", the powers were upheld although the ascertainment of all possible claimants was practically impossible. Even where the power to select the beneficiaries has been held to amount to a trust, as *Re Ogden*,[48] where the trustees were empowered to select from all "political federations or bodies in the United Kingdom having as their objects or one of their objects the promotion of Liberal principles", the mere fact that difficulties might arise in ascertaining the whole range of objects eligible for selection was not sufficient to avoid the gift.

Although the courts have generally required the terms of the powers to be such that they can control their exercise, at least in the negative sense of preventing a purported exercise to non-objects, in *Re Coates, Ramsden* v. *Coates*,[49]

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[45] In *Re Ball, Hand* v. *Ball*, [1947] 1 All E.R. 48, Roxburgh, J. held that there was insufficient certainty in the word "dependents" to permit a devise to such persons.
In *Re Gresham's Settlement*, [1956] 2 All E.R. 193, a power to appoint in a marriage settlement to a class including "any persons in whose house or apartments or in whose company or under whose care or control or by or with whom the husband may from time to time be employed or residing" was too indefinite for any appointment to be valid.

[46] [1940] 2 All E.R. 637.

[47] [1957] 2 All E.R. 430, where class consisted of all "persons who should at the date of death of the testator or his wife be employed by or who should previously have been employed in [a named company] or [have been] in the service of the testator or his wife" together with their wives and children.
Wynn Parry, J. did not refer in this decision to *Sayer's Trust*, where Upjohn, J. held it clear beyond any doubt that it was impossible to ascertain who were ex-employees of the company in question, which owned 70 confectioners shops.

[48] [1933] Ch. 678.

[49] [1955] 1 All E.R. 26.

ROXBURGH, J. upheld a power to pay small sums to such friends as the widow considered the testator to have forgotten, despite the fact that such a power involved the exercise of a discretion uncontrollable by any court and permitted the widow's choice to be substituted for the testator's.

It has been suggested that the non-delegation rule is "no more than a requirement of certainty in a class from whom the beneficiaries may be selected . . . [and that] when the problem has appeared in a case of a will, the court has naturally tended to state the rule in terms of a testamentary power".[50]

It is submitted, however, that such a rule is inapplicable in a legal system which neither imposes a duty on the individual to dispose of his property nor to complete a formally valid testamentary instrument prior to his decease. Even where a person executes a will, naming specific beneficiaries and limiting their shares, it may be upset, wholly or partially, by successful claims under the *Testators Family Maintenance Act* 1916-1954 (N.S.W.), and the advancement and maintenance provisions of the *Trustee Act* 1925 (N.S.W.).

The long-standing recognition in Equity of protective and other discretionary trusts is further argument against the extension of the non-delegation dicta, which were, it must be remembered, made in the course of decisions relating to trusts for indefinite purposes, not persons.[51]

[50] I. D. Campbell, "The Enigma of General Powers of Appointment" (1955), 7 Res. Jud. 244, at p. 251.

[51] See also the criticism of this rule made by F. C. Hutley in "The Delegation of Will-Making Powers" (1956), 2 Syd. L.R. 93.

THE FITNESS OF NEW HOUSES

Lynch v. *Thorne,* [1956] 1 All E.R. 744, is a case of great importance to builders and to those who buy houses from them. The Court of Appeal examined and considerably limited the application of the implied warranty of fitness of a house to be built or being built. The result will be to minimize the liability of the builder for defects in the plans and specification provided his contract is carefully drawn in the light of the decision.

The plaintiff in *Lynch* v. *Thorne* agreed to buy a plot of land with a house in course of erection and the defendant agreed to complete the house in accordance with a specification. The specification was detailed and provided for nine-inch solid brick walls. The house was completed and the plaintiff took possession.

The south and west walls were in a rather exposed position and in due course it was found that they did not prevent the penetration of rain. The result was that a bedroom became so damp as to be uninhabitable.

The plaintiff sued the defendant in the county court for breach of an implied term or warranty that the house was reasonably fit for human habitation. There could be no doubt that it was not so fit. The only question was the legal liability of the defendant. It was admitted that he had complied exactly with the specification, but the evidence of three architects was given as to the suitability of a nine-inch solid brick wall in that position. One of them said that he would expect driving rain to penetrate the wall—the other two said that they would not be at all surprised if it did.

The learned county court judge found that the plaintiff had relied on the defendant as an expert to provide a house reasonably fit for habitation, that there was an implied warranty to this effect and he therefore awarded damages against the defendant. On appeal the Court of Appeal reversed this decision and said that there could not, on the facts as found by the county court judge, be any implied warranty of fitness.

The earlier authorities were reviewed, and LORD EVERSHED, M.R., said that the law of England had been for many generations well settled that prima facie upon a contract for the sale of a piece of land with a house on it there was no warranty as to the habitability of the house. The rule was *caveat emptor.* But there were exceptions. An example was the sale of land with a house to be erected or to be completed. Here the rule of *caveat emptor* could not apply for the house could not be inspected and there

was an implied warranty that the house would be completed in such a way that it would be fit for human habitation. However, such a warranty could only be implied subject to the contract and must always yield to the express letter of the bargain.

These principles were then applied to the facts of the case under review. The express terms of the contract provided for the completion of the house in a particular way by the use of particular materials with particular characteristics. There was no room for the implication of a warranty that the house would be fit for human habitation. Any variation from the specification so as to make the walls waterproof would have been a deviation from the contract. The defendant had exactly complied with the contract and had shown a high standard of workmanship. He was not therefore liable.

His Lordship rejected the argument that even though there is an express contract precisely prescribing the way in which the work is to be done still there is an overriding warranty that the house when completed in strict accordance with those terms will be a habitable house; and that this warranty arises where, as in this case, the purchaser relies on the skill and judgment of the seller. He said there might be a warranty of fitness where a skilled person promises to do a job, that is, to produce a particular thing, whether a house or a motor car or a piece of machinery, and he makes no provision as a matter of bargain as to the precise structure or article he will create. If, however, two parties elect to make a bargain specifying in precise detail what one of them will do, then so long as the party doing the work does that which he has contracted to do, that is the extent of his obligation.

LORD JUSTICE PARKER somewhat enlarged upon the principles just stated. He said that where a buyer buys a house to be erected from a builder and relies on the skill and judgment of the builder there is an implied condition that the house when built shall be fit for human habitation. In a case where the express terms of the contract are wholly inconsistent with such an implied condition they clearly negative any reliance which otherwise it would be said the buyer placed on the skill and judgment of the seller. If, on the other hand, the express terms are only partly inconsistent with the implied condition there will be room for the implied condition to operate in the area not covered by the express condition.

It is submitted that the effect of the decision is this: the implied liability of the builder varies according to the particularity with which he has described his express liability. If he has undertaken an obligation expressed in

very general terms his implied liability will be to provide a house fit for human habitation. If he has undertaken an obligation expressed with great exactness there can hardly be any room for the implication of a warranty of fitness. Between the two extremes it will be a question in each case, to decide how far the express words of the contract permit the implied warranty of fitness to operate.

Builders who learn the lesson of *Lynch* v. *Thorne* will annex a detailed plan and specification to the contract as part of the contract. If this practice becomes general actions for breach of implied warranties of fitness of houses will become rare and difficult. Intending purchasers will have to obtain an express warranty or rely on the advice of an architect or surveyor as to the suitability of the specification and plan.

[Reprint of article by DONALD KEATING by courtesy of *The Law Journal, England.*]

Note by Queensland Editor

Prima facie upon a contract for the sale of a piece of land with a house on it there is no warranty as to the habitability of the house. There are, however, exceptions and one of them was cited in the statement of the law as laid down in *Lynch* v. *Thorne* (*supra*) at pp. 745 and 746 by LORD EVERSHED, M.R., namely where the contract is not merely a contract for the sale of a piece of land with a house on it but is a contract for the sale of a piece of land with a house, plus a covenant or obligation on the part of the vendor to build or complete the house. A typical example of this exception is to be found in *Perry* v. *Sharon Development Co. Ltd.*, [1937] 4 All E.R. 390. In the course of his judgment in that case MACKINNON, L.J., put the matter thus (ibid at p. 395):

> "There is obviously a difference in kind between a contract for the sale of a house which is an existing and complete structure and a contract for the sale of an incomplete house which has to be completed by the vendor. In the former case, quite clearly there is no implied undertaking by the vendor as to the fitness of the house or its condition. In such circumstances, the maxim *caveat emptor* clearly applies to the full when the purchaser inspects the house by himself or by his surveyor and makes up his mind as to its condition and fitness for occupation. The other type of house, a house only partly erected, or to be completed, is different in two respects. In the first place, the maxim *caveat emptor* cannot apply, and the buyer in so far as the house is not yet completed, cannot inspect it, either by himself or by his surveyor, and, in the second place, from the point

of view of the vendor, the contract is not merely a contract to sell, but also a contract to do building work, and, in so far as it is a contract to do building work, it is only natural and proper that there should be an implied undertaking that the building work should be done properly."

In *Lynch* v. *Thorne* (*supra*) the principles were applied to the facts of that case and the builder was found not to be liable. In *Streeter* v. *McLennan*, [1959] Qd. R. 136 the same principles were applied to a different set of facts and the builder was held liable. The document there before the court was construed in the light of admissible evidence of the surrounding circumstances as the sale of a vacant piece of land upon which the builder was under an obligation to complete a six roomed house. The house was built, the purchase price paid and the land conveyed to the purchasers who later complained that the house was not built of reasonably proper materials and with reasonable care and skill. In the circumstances, the court held that the purchasers had to accept possession but they retained their right of action for damages for breach of the implied warranty, namely that the building work should be done properly. As the evidence showed that the work was defective, the purchasers were held entitled to damages.

PHILP, J. (with whom MACK and HANGER, JJ., agreed) pointed out that in *Lynch* v. *Thorne, supra*, the plaintiff's case failed as the house had been built exactly according to the specifications laid down in the contract so that no warranty of fitness could be implied. In the instant case, however, where the obligation was merely to build a "six room dwelling", there was an implied warranty both that the house should be habitable and that the work be done properly.

J.P.K.

CASE NOTE

Privilege

Evidence—privileged documents—legal professional privilege—taxation of costs—whether litigant entitled to inspect the brief of his opponents' counsel on taxation of a bill of costs.—A decree of dissolution was granted to a petitioner husband, in exercise of the court's discretion, on the ground of his wife's adultery with the co-respondent, the latter being ordered to pay the costs. The co-respondent asked permission from the Registrar on taxation of the husband's bill to inspect the brief delivered to the latter's counsel so that he could contest items in the bill and in particular the item "instructions for Brief" amounting to two hundred guineas. The husband's solicitors opposed the application on the ground that counsel's brief was a privileged document and the Registrar then referred the question of privilege to the judge.

Held: That legal professional privilege protected from disclosure all documents which embodied communications between a client and his legal advisers enabling the client to obtain the legal advice he required whether or not such documents came into existence in anticipation of litigation. This privilege had a sound basis in common sense for it ensured complete and unqualified confidence in a client's mind, when seeking advice from his solicitor or counsel, that what he then disclosed would never be divulged to anyone else. Thus only, with the client feeling free to make full disclosure to his legal advisers, could litigation and the business of the law be satisfactorily carried on. Furthermore, once legal professional privilege attached to a document, such as the brief to counsel in the present case, it remained attached to it for all times, and did not come to an end on conclusion of the litigation to which it related.

Accordingly, his Lordship held that the co-respondent was not entitled to inspect the brief. However, the latter was free to contend before the Registrar that the sums claimed by way of costs were excessive and it would then be the Registrar's duty to scrutinise closely the contents of the brief in order to see whether it was overloaded with surplus material (*Hobbs* v. *Hobbs*, [1959] 3 All E.R. 827, STEVENSON, J. (Probate, Divorce and Admiralty Division).

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